IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE SIDE

**APPEAL FROM ORDER NO.455 OF 2002**

Sohini Mohan Shah (Jain)
residing at Boyce Bungalow,
1st floor, 34, Sleater road,
C.S. No.41, Mumbai-7 ... Appellant

V/s.

Municipal Corporation of
Greater Bombay, Mahapalika Bhavan
Mumbai - 1 ... Respondent

ALONGWITH

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Mr.M.S. Bhandari for Appellant
Mr.N.V. Walawalkar with J.Xavier for Respondent

CORAM: **SMT.NISHITA MHATRE, J.**

DATED: **DECEMBER 21, 2004**

**ORAL JUDGMENT:**

. This is a classic example of the callous attitude of the Bombay Municipal Corporation in erecting a structure without paying heed to the Development Control Rules and other laws. As a result of this a structure has been erected by the Bombay Municipal

Corporation allegedly for a municipal market, supported by pillars which touch the boundary wall between the properties owned by the appellant and the Bombay Municipal Corporation.

2. It appears that some time in 1974, the plaintiffs' land i.e., C.S. No.41 was acquired by the Respondent for constructing a municipal market. The acquisition proceedings lapsed in 1986 as no award was made. On 11.10.1995 the Improvements Committee of the Corporation passed a Resolution for a scheme to develop C.S. No.42 for constructing a municipal market. The resolution No.989 approving of the scheme was passed by the Corporation. It appears that an agreement was reached between the Corporation, the tenants of the building and the developer to redevelop the municipal plot. An IOD was issued for construction of the basement, ground floor plus five storeys. It appears that while constructing this building, the respondent erected pillars which touched the boundary wall between the plot of the appellant and the plot No.42. As a result the boundary wall was damaged. In the meantime, the plaintiff filed a suit being Suit No.2569 of 1998 for a declaration that the defendants had no right to demolish the boundary wall and for an injunction. When the compound wall was damaged a contempt Notice of Motion was taken out by the appellant. The wall was

then reconstructed. However, the construction was not effected within a month as agreed by the BMC. After the wall was reconstructed, the plaintiffs withdrew the suit as well as the Notice of Motion on 5.5.1999. It appears that the plans for the redevelopment of C.S. No.42 were then revised and as per the amended plans, space of 1.5 metres was left open at the basement level only. It appears that plans were sanctioned by the Director (ES & P) permitting the BMC to construct the building by leaving an open space between the boundary wall and the basement of 1.5 metres. However, as regards the structure above the ground, there was no requirement to leave an open space while constructing the building. The compound wall was damaged again. The pillars to support the building were being constructed, Suit No.2402 of 2000 was filed by the appellant apprehending that the compound wall would be damaged once again. Another Notice of Motion was taken out by the appellant seeking demolition of the pillars. An order of status quo was passed in respect of the wall. It appears that on 22.5.2001, when the site was inspected by the architect of the appellant, it was found that the compound wall had collapsed. Contempt proceedings were initiated by the plaintiff again. A Commissioner was appointed and the order of granting status quo was continued. It appears that the Notice of Motion then came to be allowed, partly. Prayer clauses (a) and (b)

of the Motion were refused. However, directions were also given to repair the wall. The defendants were permitted to carry out work on certain conditions pursuant to the order passed in the Notice of Motion taken out by them. It appears that contempt notice No.2426 of 2000 was dismissed for default on 18.10.2004.

3. The controversy before me is whether the construction of the building in a manner such that the pillars which support the building touch the adjoining compound wall thereby leaving no space between the two plots is permissible in law.

4. Mr.Bhandari, learned Counsel appearing for the Appellant, submits that the D.C. Rules require that at least 1.5 metres of space must be left on all sides of a building before constructing any building. He submits that in the present case the Bombay Municipal Corporation has thought it fit to use "zero open space" thereby resulting in hazard and peril to the property of the appellant that is C.S. No.41. He submits that any relaxation which has been acted upon in constructing this building is in violation of the D.C. Regulations, more particularly D.C. Regulation 64. According to the learned Advocate, it is only the Commissioner who can relax the regulations by permitting erection of a building without following the requirement of open

space. According to the learned Counsel, it is the Director of the Bombay Municipal Corporation who has sanctioned these plans and has authorised the relaxation of the requirement for open space. Furthermore, the learned Advocate submits that since acquisition proceedings have lapsed, the Respondent-Corporation was expected to leave 1.5 metres of open space between the two plots as they cannot be treated to be contiguous plots.

5. D.C. Regulation 33(7) reads as under:

> (7) Reconstruction or redevelopment by Co-operative Housing Societies, or of old buildings belonging to the Corporation.- For reconstruction/redevelopment to be undertaken by co-operative housing societies in respect of ceased properties located in the Island City which attract the provision of Maharashtra Housing and Area Development Act, 1976, or by Co-operative Housing Societies of landlord, and occupiers of a cessed building of A category subject to the provisions of the said Act and for reconstruction/redevelopment of buildings of the Corporation constructed before 1940, the floor space index shall be 2.00 or the consumed floor space index of the existing old building whichever is more. This F.S.I. will be subject to the Regulation, in Appendix III so far as construction or redevelopment by such Co-operative Housing Societies is concerned.

Therefore, it is necessary for the present developer to leave certain area as vacant space around the building.

6. Clauses 5 and 6 of Appendix III of D.C. Regulations read as follows:

> 5. Construction or reconstruction of an old

> building shall conform to the provisions of the final development plan and these Regulations. Reconstruction on part of the plot not so affected by the development plan is permissible.
>
> 6. Marginal open spaces on all sides shall be at least 1.5 m. provides that the distance between two buildings on the same plot shall not be less than 3 m.

7. It is clear that marginal open spaces on all sides shall be at least 1.5 m. provided that the distance between two buildings on the same plot shall not be less than 3 m. Admittedly the open space on all sides of the building has to be 1.5 metres at least, as provided for in the D.C. Regulations. There is no dispute that the pillars of the structure of the municipal market have been erected and are touching the suit boundary wall of the appellant. Obviously, therefore, the requirement of 1.5 metres of open space on all sides has not been made out.

8. Under D.C. Regulation 64, the Municipal Commissioner is vested with discretionary powers to relax any dimensions prescribed in the D.C. Regulations except those relating to floor space indices. However, there is a caveat contained in the Regulation that the relaxation should not affect health, safety, fire safety, structural safety and public safety of the inhabitants of the building and the neighbourhood. The submission of the learned Counsel is that by constructing this building on Plot No.42, the

Corporation has acted in violation of Regulation 64. Rule 63 permits the Commissioner to delegate powers except where the Commissioner's special permission is expressly stipulated. Mr.Bhandari submits that under Regulation 64(b), it is the Commissioner who is empowered to relax the Regulations and not the Director. Prima facie, it appears that this submission must be accepted.

9. There is no dispute that the acquisition proceedings have lapsed. However, the reservation of C.S. No.41 for municipal market in the development plan has not lapsed and continues even till today. The provisions of section 127 of the M.R.T.P. Act stipulate that the reservation continues till such time as the BMC releases the plot. It is only if the BMC does not purchase the property within six months of a notice being given by the owner that the reservation is deemed to have lapsed. It does not appear from the record before me that the reservation has lapsed. However, there is no doubt that assuming the BMC considered that C.S. No.42 is a contiguous plot while erecting the building it was necessary for them to take steps in the matter. Not having done so, it does not appear prima facie, that the BMC has acted within the provisions of the law.

10. There is no dispute that since there is no stay granted the entire building for the market has been erected. The suit is yet to be decided finally. Therefore, directing the BMC to demolish the pillars which would affect the building itself would not be proper at this stage.

11. However, the interest of the appellant must be protected. The suit building which has been erected on C.S. No.42 was to be used only for a municipal market. Obviously, therefore, the BMC must use the same for a municipal market only and for no other purpose. If any allotments have been made of the stalls in this market or any other premises in the building neither the BMC nor the allottees will claim equities in the event the suit is decided against the BMC. The BMC will inform all future allottees of the existence of the suit prior to making the allotment of space in the building.

12. In the circumstances, the suit is expedited. The BMC to file their written statement by 17.2.2005. The City Civil Court, Mumbai shall dispose off the Suit by 31st July, 2005. The trial Court shall consider the matter, uninfluenced by the observations made in this order which are prima facie.

13. Appeals are disposed of accordingly.